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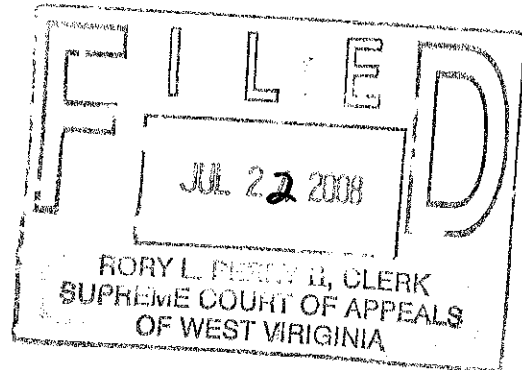
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JERRY ALLEN WEAVER, a
retiree of the West Virginia Public
Employees Retirement System,**

**Appellant and
Defendant Below,**

**WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD,**

**Appellee and
Plaintiff Below.**



**JERRY ALLEN WEAVER'S REPLY TO WVCPRB'S OPPOSITION TO
JERRY ALLEN WEAVER'S BRIEF FOR APPEAL**

Appeal from Final Order
dated July 23, 2007, in Civil Action No. 06-C-2360
In the Circuit Court of Kanawha County, West Virginia

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I. POINTS AND DISCUSSION OF THE LAW

A. Conduct Must Be “Related To” The Opportunity Presented By Virtue of the Public Trust to Warrant Forfeiture of PERS Pension Benefits

Despite the claims of the West Virginia Consolidated Public Retirement Board (“WVCPRB”) that this case is about a general breach of public trust, the simple issue before this Court is, as defined by statute, whether Mr. Weaver’s conduct is “related to” his public position. This issue was specifically, and largely conclusively, addressed by Judge Copenhaver at Mr. Weaver’s sentencing. After listening to testimony and argument presented by the United States Attorney’s Office trying to connect Mr. Weaver’s office with his actions, Judge Copenhaver found that there was absolutely no connection. There ends the permissible debate under West Virginia law; Mr. Weaver is entitled to his valuable PERS pension.

The WVCPRB attempts to diminish the rigorous analysis performed by Judge Copenhaver with its argument that the context of Mr. Weaver’s criminal case somehow makes Judge Copenhaver’s findings irrelevant. *See Resp. Brief of the WVCPRB in Opp. to Brief for Appeal*, at p. 11. In dismissing Judge Copenhaver’s analysis, the WVCPRB ignores a clear statutory mandate that it must show that Mr. Weaver’s conduct was “related to” the duties of his office. It cannot meet such a burden in this case, and Judge Copenhaver’s finding reinforces this point. At the end of the day, there is simply no evidence to suggest Mr. Weaver committed any wrongdoing “related to” the opportunity that *he* enjoyed by virtue of holding *his* office.

In dismissing Judge Copenhaver’s analysis, the WVCPRB also dismisses the only real evidence in the record on appeal. Not surprisingly, the evidence in the record underscores that there is no connection between Mr. Weaver’s conduct and his office – not a single showing that Mr. Weaver was even accused of malfeasance or misfeasance in his duties as Assessor. Judge Copenhaver took great care to assess any and all evidence pointing to Mr. Weaver’s actual

abuse of office, of which there is none. There was no new evidence presented to Judge Stucky, and there is no simply no factual evidence to support the WVCPRB's case. Rather, Judge Stucky's decision is a result of a clearly erroneous application of the law.

This is precisely what the New Jersey Superior Court faced when it held that a police officer's off-duty aggravated assault was "too attenuated" to have been "related to" his office. *See T.J.M. v. Bd. of Trustees of the Police and Firemen's Retirement System*, 527 A.2d 883, 886 (N.J. Super. Ct. App. Div. 1987). The critical fact for the *T.J.M.* Court was that "no weapon or other instrument or indication of office was involved in the crime's commission." *Id.*; accord *West Virginia Public Employees Retirement System v. Dodd*, 183 W.Va. 544, 396 S.E.2d 725 (1990). The same can be said of Mr. Weaver's crime. The *T.J.M.* Court flatly rejected the precise argument made here by the WVCPRB that some higher level of public trust mandates spotless behavior at all times. *Id.* This Court should likewise reject the WVCPRB's identical argument that would result in forfeiture for any crime committed by any public employee guilty of violating the "greater level of public trust" asserted by the WVCPRB.

The WVCPRB's logic has resulted in an overbroad, erroneous interpretation of the PERS forfeiture statute; this interpretation will inevitably lead to absurd results. The "direct nexus" that has been relied upon by the WVCPRB to justify terminating Mr. Weaver's PERS pension benefits is: "Appellant's office exists by virtue of election. He tampered with elections. There simply could not be a more direct nexus." *Resp. Brief of the WVCPRB in Opp. to Brief for Appeal*, at p. 5. The WVCPRB glosses over the lack of any evidence that Mr. Weaver's actions affected his own election. By its logic, a West Virginia elected official who – despite having an exemplary record as a West Virginia elected official – engages in a conspiracy to buy votes in an election in Utah would have engaged in criminal conduct "related to" his or her public office.

Simply put, this Court should not adopt such an overbroad and erroneous interpretation, which would provide the WVCPRB the opportunity in the future to order forfeiture for even the most unrelated crime.

For example, by the WVCPRB's and the Circuit Court's logic, any Department of Transportation official who has an exemplary record of success on the job – but who is found guilty of driving under the influence of alcohol three or more times pursuant to W. Va. Code §§ 17C-5-2(d) and 17C-5-2(l) – would be in danger of losing his or her PERS pension benefits, regardless of whether the act was committed in the course of some official duty or while using a government-owned vehicle. Indeed:

It is the mission of the West Virginia Department of Transportation to create and maintain for the people of West Virginia, the United States and the world a multi-modal and inter-modal transportation system that supports the safe, effective and efficient movement of people, information and goods that enhances the opportunity for people and communities to enjoy environmentally sensitive and economically sound development.

West Virginia Department of Transportation Mission Statement, accessed at http://www.wvdot.com/11_WVDOT/11_about.htm, on July 10, 2008. There is no question that a WVDOT employee's job exists by virtue of a general desire to maintain safe roads. Thus, the WVDOT employee's felony conviction under W. Va. Code § 17C-5-2(d) and 17C-5-2(1) would directly interfere with his central mission as a WVDOT employee, even though it was done on his own personal time, with his own personal vehicle. There is certainly a general public trust that the WVDOT employee will work toward the safe, effective and efficient movement of people.

By the WVCPRB's and the Circuit Court's logic, this attenuated connection between the hypothetical WVDOT employee's private shortcomings, though they happen to be related to

motor vehicle safety generally but not to the employee's position specifically, would seemingly be enough to strip the employee of his valuable PERS pension benefits and his livelihood in his old age, regardless of the employee's actual work history. Such logic and the Circuit Court's erroneous application of W. Va. Code § 5-10A-1 *et seq.*, which led Mr. Weaver's loss of his valuable right to PERS pension benefits, should not be permitted to stand. Mr. Weaver's crime bears only an attenuated connection to his formerly-held public office, and his PERS pension benefits should be reinstated.

Finally, Mr. Weaver's point in highlighting the history of W. Va. Code § 5-10A-1 *et seq.* was not to debate levels of public trust but rather to demonstrate that "rank and file" employees and public officials historically have had different opportunities as a result of their respective positions. Indeed, in its Response to Mr. Weaver's Brief on Appeal, the WVCPRB mischaracterizes or misunderstands the reason for Mr. Weaver noting an historical distinction between public officials and "rank and file" employees. The WVCPRB claims that "opposing counsel suggests that public officials should be held to a lower standard than the "rank and file" employees." *See Resp. Brief of the WVCPRB in Opp. to Brief for Appeal*, at p. 7. This is not Mr. Weaver's argument; Mr. Weaver only wants this Court to apply West Virginia law – as written – to his case and to require the WVCPRB show that his conduct "relates to" the duties of his office. Since it cannot, the decision of the Kanawha County Circuit Court should be reversed

and judgment granting Mr. Weaver his PERS pension should be entered.

Respectfully submitted,

JERRY ALLEN WEAVER

By Counsel

SPILMAN THOMAS & BATTLE, PLLC

A handwritten signature in cursive script, appearing to read "Randal M. Whitlatch", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Randal M. Whitlatch, hereby certify that on this 22nd day of July, 2008, the foregoing
“Jerry Allen Weaver’s Reply to WVCPRB’s Opposition to Brief for Appeal” was served
upon the following individuals and/or counsel to this action by depositing a true copy thereof in
the United States First Class mail, postage prepaid, and addressed as follows:

*J. Jeaneen Legato
Counsel to the Board
State Capitol Complex
Building 5, Room 1000
Charleston, WV 25305*



Randal M. Whitlatch